Submission to Expert Panel on Oil Spill Preparedness and Response Regime

By: Captain Jack Gallagher

Title: President

Company: Hammurabi Consulting

Address: 5591 Leeds Street

Halifax, Nova Scotia

B3K 2T3

Telephone: + 1 902 489 2378

Email: jackgallagher@hammurabi.ca

Website: www.hammurabi.ca

Submitted by Email : 25 April 2013

HAMMURABI

Submission to Expert Panel on Oil Spill Preparedness and Response Regime

Executive Summary

Several areas of the Canadian regime require either amendment or further study if we are to move towards having a "world class" regime. It is recommend that:

1. Spill management be addressed in the regime and either require private sector On Scene Commanders to manage all spills with Coast Guard in a monitoring role or always have the Coast Guard as On Scene Commander.
2. Ships be compelled to activate their Response Organization and spill contingency plan in every case of having an oil spill.
3. Steps be taken to ensure there is a capability and capacity to intervene to assist ships or to salvage ships should it be necessary to avert or minimize a pollution response.
4. The legislative ambiguity that exists as to who can direct or prohibit entry into ports be removed.
5. A clear chain of command and authority be established for exercising Canada's rights and obligations under domestic law and international convention including:
    a. The obligation to assist the Shipmaster in the discharge of their statutory duty to safeguard the crew, ship and cargo.
    b. The right to intervene to prevent or minimize pollution damage.
    c. To authorize the use of "places of refuge" for ships in need.
    d. To authorize salvage as a pollution response strategy.
6. The role in pollution preparedness and response of the Canadian Coast Guard be clarified and established with clear levels of service statements that describe the services offered, the limitations on such services and how such services are to be measured.
7. The capacity of the Response Organizations should be increased.
8. The use of dispersants as a response strategy should be pre-approved and not left to a proof of "environmental net benefit" in each case. This should be followed by developing adequate stocks of approved dispersants accompanying tools for application.
9. The use of in-situ burning should be approved as a response strategy with suitable equipment inventories established.
10. Environment Canada be compelled to re-establish and chair the Regional Environmental Emergencies Teams.
11. Port State Control inspections should not be relegated to lesser qualified individuals than are currently carrying out these duties at Transport Canada.
12. The Ship Source Oil Pollution Fund be increased to afford a higher level of financial protection in the event of ship source spills.
13. Pollution from ships should only be investigated and prosecuted under the Canada Shipping Act. Related provisions in the Migratory Birds Act, Canadian Environmental Protection Act, the Fisheries Act and any others should be forbidden for use for spills originating from ships.

The current regime is weak in several areas and this panel represents an opportunity to recommend substantive change.

Managing a Spill

Currently the Coast Guard Response Officer upon having a spill reported has to determine if the polluter is known, willing and able to mount a response operation prior to any substantive action being taken. The default position is that the three conditions will be met in the affirmative and the CCG will assume the role of a Federal Monitoring Officer.

The Response Organizations have clearly stated that they will respond as contractors but will not manage the response.

This situation has led to circumstances where the CCG spends the first hours at a spill site trying to determine who is going to manage the spill. Typically the Shipmaster knows little or nothing about spill response, the agent and others available are in the same position. There is no cadre of private sector spill managers in Canada.

In the United States of America ships must have an arrangement with a response organization and a spill management company. The persons trained to manage the spill are called Qualified Individuals (QI).

There have been instances where spills in Canada have been managed, by telephone, by a QI from the USA.

There are two potential solutions to this issue: make the CCG the On Scene Commander (spill manager) for every spill or create a funded program that addresses spill management similar to the USA. Either situation should eliminate the uncertainty that exists in the early stages of a spill response.

Triggering a Response

Although the Canada Shipping Act requires ships to have arrangements with private sector response organizations they are under no obligation engage the response organization if they have a spill.

Many correctly argue that a minor bunkering incident it can often be handled quickly and cost effectively by a small contractor with a vacuum truck and some sorbent pads. This however leads to a situation where there are specialized response organizations with equipment and personnel available who may rarely respond in all but large incidents.

If there is to be a robust system of response, ships should be compelled to activate their response organization in the event of a spill.

Salvage and Response Capability

When the current regime was developed it considered and relied on vessels of opportunity as responders. Since that time government fleets have shrunk, and private sector fleets rarely have excess fleet capacity that is crewed and ready to mobilize on short notice.

A risk assessment should be completed to determine the required salvage standby capability. Without a robust assessment it would appear that at least three areas have a risk that is worth investigation. In the Bay of Fundy there are many large tankers that carry crude to the Single Point Mooring off Saint John Harbour. If such ships were to become disabled during their transit there is normally nothing more capable than a harbour tug or small CCG lifeboat available to render assistance. The same is true for Chedabucto Bay and the St. Lawrence River at Saint Romuald. Other locations may also merit review.

Salvage is not as common with today's reliable ships as it once was. With the decline in salvage operations there has been a marked decrease in salvage capability both equipment and personnel. The loss of capability means there are few opportunities to intervene in a meaningful way should a ship, particularly a large tanker become disabled. An appropriate intervention could prevent an relatively minor situation from becoming a large pollution incident.

Looking at the USA model, ships now must have Salvage and Marine Firefighting Plans including arrangements with a service provider for such services.

Having an intervention capability can be provided by public resources, private resources or a mix. Such capacity is sorely lacking in Canada should be considered an integral part of the response regime.

Roles and Responsibilities

In addition to the issue previously describe regarding who is On Scene Commander for an oil spill is the issue of who has ultimate authority to grant a place of refuge or to direct a ship to a particular location when necessary to either prevent or address a pollution incident. Current authorities are granted to pollution prevention and response officers under the Canada Shipping Act as well as Port Authorities under the Canada Marine Act.

The current Transport Canada National Places of Refuge Contingency Plan states:

> ***Considering the authorities and jurisdictions of the* CSA *and* CSA 2001 *and those of the* Canada Marine Act*, there is a potential for conflicting directions being given to a ship concerning a specific port. In such situations, every effort must be made for the responsible authorities to agree on a required course of action.***

It is untenable that conflicting legislative authorities that are well known are left to be resolved by the various parties after a situation has developed.

Internationally there is a disturbing trend for coastal states to prohibit entry to ships in need of refuge as the "power to intervene" is seen a paramount to the "obligation to assist the Shipmaster in the discharge of their legal duties". By virtue of signing international conventions we have both rights and obligations. Sadly, there is no policy stating Canada's objectives in such a situation or giving ultimate authority to a person with the professional qualifications to appropriately assess and manage such an incident.

A model worthy of study is that of the Secretary of State Representative for Maritime Salvage and Intervention (SOSREP) in the United Kingdom. The SOSREP has the ultimate authority on behalf of the government to make intervention and salvage decisions. The government when appointing him agrees that his authority cannot be questioned and the only two responses available to government are to "back him" or "sack him". Even if a SOSREP model is not chosen there should be a clear authority and accountability for such intervention, salvage and response decisions.

Role of Coast Guard

The role of Coast Guard in Oil Spill Response requires clarification. They have some role in preparedness and response but it is not crystal clear what that role is. Therefore they are sometimes buying oil spill response equipment and pre-positioning it but based on available funding that comes along from time to time rather than on a definite role where they will have equipment and manpower to perform a given role. It is unclear why Coast Guard has equipment that is in the inventory of private sector responders or if they should have any equipment at all.

The current Levels of Service for CCG Environmental Response includes:

> **Provide qualified environmental response personnel and pollution countermeasures equipment.**
>
> **If required, CCG resources will be mobilised within 6 hours of completion of the assessment. Arrival time on-scene will vary.**

Such statements don't explain when CCG equipment is to be used and why it is preferred over that held by a Response Organization. It doesn't describe whether the CCG is capable of responding to an incident well offshore, only near-shore spills, if they have skimmers and ships or whether they will arrive with a pair of binoculars and radio as their only response tools.

Without a definite legislated role the numbers of response personnel in Coast Guard diminishes in response to overall government funding pressures and equipment is not regularly recapitalized. The national exercise program and the budgets that were transferred from the "Green Plan" have long since disappeared making it impossible for every region to conduct all levels of exercises in a given year. The ability to fully participate in the mandated joint exercises with the United States Coast Guard is under pressure every time such an exercise is to be conducted. Often the question being asked is "what can we afford to jointly exercise" rather than "what do we need to jointly exercise".

The Coast Guard may be a monitor of a private sector managed response or they may be running the response or they may be directed to take over a response if a spill is deemed of "national significance" although this term has not been defined.

The role of Coast Guard as a responder and manager needs to be clarified and appropriate levels of service set so that everyone involved in the regime understands the components filled by Coast Guard.

Capacity of Response Organizations

The Response Organizations have done a commendable job of building a private sector response capability that previously did not exist. Although ten thousand tonnes is a large spill it represents about three percent of the cargo carried by many tankers in Canadian waters. It was a good starting point but should not be the endpoint. The capability and capacity of all response organizations should be raised.

An increase in capacity can be achieved by both increasing the total required capacity that a Response Organization (RO) must have in its Geographic Area of Responsibility (GAR) and by removing the ability for them to meet the requirements by mutual aid between ROs and GARs.

The capability of ROs should also be increased by having them stock offshore boom, dispersant and related equipment as well as capability for in situ burning.

Non-traditional Oil Spill Response Technologies

Although technically dispersants are a response tool in Canada there is little or no stock or deployment systems and there are legislative hurdles to their use.

Currently it is the view of Environment Canada that it is illegal to put dispersants in the water as they are deleterious to the environment and fish habitat and therefore cannot be used. On a case by case basis they are willing to consider whether the use of dispersants would be allowable if the person proposing their use can prove an environmental net benefit.

Given that the window to use dispersants is relatively short and that "environmental net benefit" is not defined obtaining a decision on dispersant use is likely to come too late. In most cases dispersant and aircraft would need to be staged in the early hours of an incident which is unlikely to happen on the happenstance that a decision will be both timely and positive.

Canada should allow dispersant used in pre-defined conditions. A matrix should be developed indicating the conditions for dispersant use so that responders can pre-plan. This item should not be up for debate or separate approval from the rest of the response plan once the oil is in the water.

There is almost no equipment to support in-situ burning as a response strategy. This has been shown to be a viable and useful response strategy in some spill responses and it is unclear as to why there has been no investment in this area in Canada.

Regional Environmental Emergency Teams

Environment Canada has disbanded the Regional Environmental Emergency Teams and consolidated with fewer personnel in two locations nationally. It is always better to have all of the representatives in the same room as soon as possible after initial notification. It is important to work and exercise with the people and agencies on an ongoing basis and develop trusted relationships. Once the oil is in the water, it is not the time to try and make new friends.

Environment Canada has totally abdicated their responsibility to the vital support they provide to an oil spill response. They should be required to rebuild these offices and chair the REET committees.

Inspection of Tankers

Canada has not suffered a major tanker accident in many years. This can, in part, be attributed to our Port State Control Regime and the dedicated and professional inspectors who carry out this function. Internationally, charters know that old or substandard tonnage is not wisely sent to Canadian ports where it will most assuredly be rigorously inspected and detained if any deficiencies are found.

The current cadre of inspectors are highly qualified, experience mariners with marine certificates of competency of the highest degree. Sadly, Transport Canada is considering allowing personnel with lower qualifications and armed with a checklist take on this vital role. This is a model that the United States Coast Guard uses and is subject to derision by many experienced seafarers.

Transport Canada should be required to continue using Master Mariners, Chief Engineers and Naval Architects as port state control inspectors and not allow this task to be relegated to less qualified individuals. Consideration should be given to increasing the numbers of inspectors to improve the percentage of ships inspected each year.

Ship Source Oil Pollution Fund

The SSOPF has not collected any fees to increase the size of the fund since 1976 and the current limit that the fund is liable for one spill is just under one hundred and sixty million dollars. Given the trend in cost of clean-up and third party claims this represents an insubstantial amount of money.

The limits of the fund should be reviewed to determine if all of the interests intended to be covered by the fund would be adequately addressed with the current limits. Consideration should be given to affording protection of the SSOPF equal to that offered by the International Oil Pollution Compensation Fund.

Enforcement in Case of Alleged Pollution Infractions

There are several pieces of legislation that can be used to prosecute polluters including the Canada Shipping Act, the Fisheries Act, the Migratory Birds Act, and the Canadian Environmental Protection Act. The penalties and burdens of proof are not consistent across the legislation and there could be a number of different enforcement officers who claim jurisdiction.

All pollution from ships should be clearly and only punishable under the Canada Shipping Act. This will make clear who has authority to deal with ships and lessen the risk of contradictory information being sent from different agencies or having a group of different enforcement officers on the dock waiting to board a ship on arrival.

Summary

The current regime cannot be considered “world class” when we have unclear authorities and don’t even know who is in charge when the oil first hits the water. The panel has an opportunity to provide guidance to the government make the Canadian regime far more robust.

This submission is brief and I trust provides suitable detail to identify some of the key issues. If additional information or clarification is required I would be please to attend one of your hearings or provide support material remotely.